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OCTOBER TERM 1959

No. 5

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No.

WALTER O. ANDERSON, ET AL.,
Petitioners,

v.

C. RAYMOND SWART, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Vermont entered in the above-entitled case on January 3, 1961.

Opinions Below

The judgment of the Court of Chancery, Chittenden County, Vermont, is unreported, but is to be found in the record as printed for the use of the Court below (R. 29). The opinion of the Supreme Court of Vermont, printed in Appendix A hereto, is reported at 167 A. 2d 514.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257(3). The judgment of the Supreme Court of Vermont was entered on January 3, 1961.

Question Presented

Under a statute of the State of Vermont, enacted in 1915, the South Burlington Town School District, having no high school of its own, has been disbursing public tax-raised funds to meet the charges of tuition for the attendance of pupils residing within the School District at high schools not operated by it selected by their parents or guardians and approved by the State Department of Education. Some of these high schools so selected were owned and operated by the Roman Catholic Diocese of Burlington, Vermont, or by a religious order of the Diocese of Burlington. The tuition payments could be made either to the schools attended by the pupils or to their parents or guardians upon bills submitted (R. 24). The precise question here presented is whether the payment of tuition to sectarian high schools selected by the parents or guardians of pupils residing within the School District or to the parents or guardians of such pupils is prohibited by the First and Fourteenth Amendments to the Constitution of the United States.

Statute and Constitutional Provisions Involved

Title 16, Vermont Statutes Annotated, Section 793:

> "PAYMENT OF TUITION. Each town district shall maintain a high school or furnish secondary instruction, as hereinafter provided, for its advanced pupils at a high school or academy, to be selected by the parents or guardian of the pupil, within or without the state. The board of school directors may both maintain a high school and furnish secondary instruction elsewhere as herein provided as in the judgment of the board may best serve the interest of the pupils. Each town district shall pay tuition per pupil per school

year as billed, but not in excess of $325.00 unless authorized by a vote of the town school district but in no case shall the tuition exceed the cost per pupil per year for the maintenance of such school for the previous year. The board of school directors or trustees having the control of a high school or academy which received non-resident pupils and which proposes to increase its tuition charges shall notify the board of school directors of the towns from which its non-resident pupils come of such proposed increase on or before February 1 in any year, and file the proposed increase with the board of education, and such increase shall not become effective until the following school year. The board of school directors of a school district regularly paying tuition for a majority of its secondary pupils to a district out of the state, when authorized by vote of the district may pay for secondary education at the out-of-state high school a per pupil rental fee not to exceed the amount determined by dividing three per cent of the original cost of the facilities by the total number of pupils enrolled therein during the preceding year, exclusive of costs not provided for by the taxpayers of the out-of-state district."

The First Amendment to the Constitution of the United States provides in pertinent part as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

"Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its juridiction the equal protection of the laws."

Statement of the Case

1. *Proceedings Below.* This case comes to this Court from the affirmance by the Supreme Court of Vermont of a judgment of the Court of Chancery, Chittenden County, Vermont, decreeing that the payment by a school district of tuition of its resident pupils at sectarian high schools or academies selected by the parents of pupils residing within the school district and required to attend high schools not operated by it is prohibited by the First and Fourteenth Amendments to the Constitution of the United States, and enjoining the School Directors and their Treasurer from paying such tuition.

The Court of Chancery entered a decree on the 19th day of February, 1960, restraining and enjoining said School District, its Board of School Directors and its Treasurer "from paying or causing to be paid tuition of its resident pupils at Rice Memorial High School and Mount Saint Mary's Academy or at other sectarian school within or without the State." Under the terms of the Court's decree, the School District is barred from paying the tuition either directly to the sectarian schools or to the parents or guardians of the pupils attending them (R. 36). An appeal from the judgment of said Court of Chancery was taken by all of the defendants and the intervenors therein to the Supreme Court of Vermont (R. 37-38). On January 3, 1961, the Supreme Court of Vermont affirmed the decree of the Court of Chancery.

2. *Standing of Petitioners.* Walter O. Anderson, Rene J. Berard, W. Jerome Charbonneau, Vincent J. D'Acuti and

Robert Hayes, as taxpayers and residents of the Town of South Burlington, filed in the Court of Chancery a petition to intervene as parties defendant in this case and were permitted so to do (R. 25).

Intervenors Anderson, Charbonneau and D'Acuti have children in one of the Catholic high schools, Rice Memorial. Anderson is not a member of the Catholic Church. Charbonneau and D'Acuti are members. Tuition for children of said three intervenors was being paid by said School District to said Rice Memorial High School (R. 26).

All of said five intervenors were appellants in the Supreme Court of Vermont and are the petitioners herein.

Respondent Swart was the plaintiff below. Respondents South Burlington Town School District, Roscoe C. Bacon, John D. Donoghue, Bernice Hallett, Mildred O'Hare, School Directors, H. F. Tilley, Treasurer, and Frederick Reed, Vermont Attorney General, were defendants below and have not joined in this petition. Therefore, they are named as respondents herein.

3. *The Facts.* Respondent Swart herein, plaintiff below, is a resident and taxpayer in said School District and, as such, paid school taxes for the years 1952-53 through 1958-59 (R. 20). The duly elected, qualified and acting members and Treasurer of said School District's Board of School Directors, pursuant to said Vermont statute and in view of said School District not maintaining any high school for its resident pupils, had disbursed out of its tax monies certain payments of tuition for its resident pupils to public high schools in other school districts and to private schools and academies within and without the district selected by their parents or guardians and approved by the Department of Education of Vermont (R. 22). Among the schools which had received such payments were three high schools operated under Catholic auspices. Most of the teaching in

these schools was done by members of Catholic religious orders. Some lay teachers were employed. These schools had been approved by the State Department of Education (R. 24).

Non-Catholic students in these Catholic schools were not required to take courses in religion. Catholic students were so required. Some non-Catholic pupils residing within said School District attended a Catholic high school (R. 22).

Forms prepared but not prescribed by the State Department of Education, entitled "Tuition Invoice", were used by the private schools billing said School District for such tuition of its pupils. Said Department had not established any policy, rule or regulation regarding the method of payment adopted by the School District. The School District had the election either to pay the tuition to the schools directly or to the parents or guardians upon bills submitted (R. 24).

Plaintiff below is of the Protestant faith and objects to the payment of tax-raised public school funds to religious denominational schools (R. 25).

The record shows that the tuition of children resident within the School District attending public schools outside said School District was paid by it (R. 24). The record does not show the number of children attending non-sectarian schools or the number enrolled in sectarian schools whose tuition was paid by said School District herein. Although the record in the instant case does not disclose the ratio of the South Burlington pupils attending sectarian schools to the total number of South Burlington pupils attending schools not operated by the School District, a reliable indication may be found in a recent opinion of the Supreme Court of Vermont, mentioned in the opinion of that Court in this case. In *Donoghue v. Smith*, 119 Vt. 259, 126 A.2d 93, 94. the Supreme Court of

Vermont referred to the number of high school pupils resident in South Burlington who were attending schools not operated by the School District and for whom tuition was paid by said School District. Quoting from a report of the South Burlington Town School District, apparently covering the year 1954, the Supreme Court of Vermont noted that the "total number of pupils [was] 198; . . . total tuition paid $43,068.50; of this total number of pupils, 63 . . . were not attending a public school . . . of any district. . . ."

4. *How Federal Question Was Raised and Decided Below.* In the complaint which he filed with the Court of Chancery, the plaintiff below alleged that the payment of public, tax-raised funds by the South Burlington Town School District to sectarian schools was "in violation of the Constitution of the United States as hereinabove set forth." (R. 11). The School District directors, defendants below, denied the allegation (R. 18). In the trial court the parties agreed and the Chancellor adopted the theory that the First Amendment of the Constitution of the United States and Article 3, Chapter 1 of the Vermont Constitution were similar, and that a violation of one would constitute a violation of the other (R. 31). In reaching his decision, the Chancellor relied exclusively on his interpretation of the First Amendment, finding that the payment of tuition by the School District for pupils in sectarian schools selected by their parents or guardians was prohibited by the First and Fourteenth Amendments (R. 36).

On appeal, however, the Vermont Supreme Court put aside discussion or decision of possible relevant limitations of the Vermont Constitution, since it was of the view that "in the domain of religious liberty, the resolute history of the First Amendment seems the more demanding." Accordingly, the Vermont Supreme Court considered the

question of the constitutionality of the tuition payments under challenge solely "from the Federal aspect" (R. 47). In affirming the Chancellor's decree, the Supreme Court, after discussing pertinent decisions of this Court, found that the School District and the defendant members thereof, "while acting within the literal provisions of the [Vermont] statute, have exceeded the limits of the United States Constitution." (R. 52).

Reasons for Granting the Writ

A. The Supreme Court of Vermont has held in this case that payments of tuition out of public funds by a school district (which does not maintain high school facilities and is required by statute to furnish pupils secondary instruction at schools not operated by the school district) for resident pupils enrolled in sectarian schools which are selected by the parents or guardians of the pupils and which schools meet state educational standards in all respects, violate the First and Fourteenth Amendments of the Constitution of the United States. The Court of last resort of Vermont thereby has decided a Federal question of substance in a manner not in accord with applicable decisions of this Court. These have sustained the constitutionality of governmental, non-discriminatory assistance rendered to pupils enrolled in sectarian schools, when the purpose of the legislation under which that assistance was provided was to serve the public welfare. *Everson* v. *Board of Education*, 330 U.S. 1; *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370; *Bradfield* v. *Roberts*, 175 U.S. 291; and *cf. Quickbear* v. *Leupp*, 210 U.S. 50.

B. The precise question of whether the non-discriminatory use of public funds to pay the tuition of pupils attending sectarian schools is permitted by the First and

Fourteenth Amendments under the circumstances presented by this case, has not heretofore been determined by this Court. That issue is squarely raised by the decision below, of which review is sought by this petition. The issue presented is a Federal question of important and current substance. Over twenty-one thousand school systems in the United States do not now provide secondary school facilities within their boundaries. *Public School Systems in 1960*, Bureau of the Census (November 9, 1960), pp. 5-6. The decision of the Vermont Supreme Court, of course, is not controlling beyond the borders of Vermont. However, unless its holding is clarified or reversed by this Court, almost inevitably it will be treated as a precedent calculated effectively to deter the school systems of the nation from providing any type of tuition or other aid for those of its children whose parents elect to have them attend sectarian schools when public school facilities are not provided by the school district in which they reside.

C. If the holding of the Vermont Supreme Court is permitted to stand, its impact will be felt in another and important respect. It would appear that both the Executive Branch and many members of the Congress, as a result of their understanding of previous decisions of this Court, have concluded (erroneously, petitioners contend) that any form of direct payment of public funds to a sectarian school violates the First Amendment. *The New York Times*, February 21, 1961, p. 1, March 8, 1961, p. 18; *The Washington Post and Times Herald*, March 10, 1961, p. 1. This Court's failure to clarify or reverse the decision of the Vermont Supreme Court cannot help but strengthen such official conviction of the constitutional limitations on the power of the Congress to provide aid for sectarian schools. If the Chief Executive and the Congress exclude the pupils enrolled in the sectarian schools from the benefits

of any legislation proposed and enacted for the relief of the elementary and secondary school pupils of the country, out of a mistaken belief that pupils of such sectarian schools cannot constitutionally be included, their misconception of applicable law may well be frozen into the pattern of Federal legislation enacted for the benefit of American school children. H.R. 4970, 87th Cong., 1st Sess., February 28, 1961, and S. 1021, 87th Cong., 1st Sess., February 20, 1961. Thereafter, no taxpayer, under applicable decisions of this Court, would possess the requisite standing in the courts to challenge the legislation enacted and the disbursements of funds provided for therein. *Massachusetts* v. *Mellon*, 262 U.S. 447. Petitioners do not seek an advisory opinion beyond the power of this Court to provide. *Muskrat* v. *United States*, 219 U.S. 346, 354. The justiciable issue on which the Court is asked to pass in this case furnishes an opportunity for an important decision by this Court which never again may arise. Whatever deference this Court customarily affords its state court brethren and their opinions, whether out of comity or because of the indispensable prerequisites of a workable federalism, the most compelling reasons exist for not permitting the Supreme Court of Vermont the last judicial word on a Federal constitutional issue of current and far-reaching national consequence.

We state these reasons in more detail immediately below.

A. *The Decision Below is not in Accord with Previous Decisions of This Court*

1. *The Federal Question Presented and Decided Below.* The Federal question presented in this case was raised before the Chancellor (R. 12), decided by him (R. 36), and again argued before and decided by the Vermont Supreme Court in the decision brought here for review (R. 39-52).

There is no question in this case but that the Federal question presented here has been properly raised in and squarely decided by the State Court within the requirements of the jurisdictional prerequisites which condition review by this Court. *Whitney* v. *California*, 274 U.S. 357, 360; *Manhattan Life Insurance Co.* v. *Cohen*, 234 U.S. 123, 134. The Supreme Court of Vermont explicitly based its decision on the determination that the First Amendment prohibited the disbursements of public tax monies involved (R. 51). *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 197, fn. 1. Nor does the record permit surmise that the Supreme Court of Vermont might have reached its decision upon any adequate State grounds. Resolution of the Federal question was necessary for the Vermont Supreme Court to have decided as it did. The Chancery Court and the opposing parties proceeded on the assumption of record that a violation of the Vermont Constitution could be established only by demonstrating that a violation of the First Amendment existed (R. 30).[1] *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 98; *Grayson* v. *Harris*, 267 U.S. 352, 358; and see Stern and Gressman, *Supreme Court Practice* 98 (2d Ed., 1954). The Vermont Supreme Court, however, decided the case solely from the point of view of the Federal question involved (R. 47).

2. *This Court's Established Construction of What the First Amendment Permits or Prohibits.* The decisions of this Court which stake out the scope of the "non-establishment" clause of the First Amendment (to the extent it is now incorporated in the Fourteenth Amendment) are few. Still, the Court has said enough on those occasions to have

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[1] At least one early Vermont decision strongly suggests that the tuition payments involved in this case do not offend Vermont law. *Congregational Society* v. *Ashley*, 10 Vt. 241, 244-5 (1838). This case is discussed in O'Brien, *Has Government an Interest in Religion?*, 5 Vill. L. Rev. 335, 348 (1960).

established several propositions regarding the constitutional power possessed by the States and the Federal government to provide financial or other assistance by which sectarian institutions, including schools maintained by such institutions, are benefited, either directly or indirectly. They support our contention that the decision of the Vermont Supreme Court misconstrues the First Amendment, and misreads the decisions of this Court on which its own opinion purports to rest. Petitioners state at this point what they believe those propositions to be:

First, it is incontestable that government in this country is not hostile to religion or toward religious institutions. We are, indeed, "a religious people." Our "laws, . . . business, . . . customs, and society" constitute a "recognition of [that] . . . truth." *Holy Trinity Church* v. *United States*, 143 U.S. 457, 465-472. Nothing written into the First Amendment, or implied from its historical purpose, demands that "the state and religion . . . be aliens to each other, hostile, suspicious and even unfriendly." *Zorach* v. *Clauson*, 343 U.S. 306, 312. Legislative action which intentionally discriminates against religion, or religious institutions, is to be condemned equally with legislation which deliberately attempts to favor specific religious sects, or tends to establish a church or churches. *Davis* v. *Beason*, 133 U.S. 333, 342; *Zorach* v. *Clauson*, *supra* at 314.

Perhaps there is no better example of the permissible preferment or special regard which religion has in the eyes of American law than the traditional allowance of tax exemptions for religious institutions. That practice has received the endorsement of the State courts. Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 Law and Contemp. Prob. 144, 146 (1949). This Court, too, while never squarely passing on the con-

stitutionality of the practice, either as to Federal or State tax exemptions, seems to have bestowed its implied approval of it. *Lundberg* v. *Alameda County*, 46 Cal. 2d 644, 298 P. 2d 1, appeal dismissed 352 U.S. 921; *Zorach* v. *Clauson, supra* at 312.[2] Petitioners have no established information on the basis of which to estimate, even approximately, the amount of direct financial benefit to religious institutions which their preferred tax status affords them. They assume, with reasonable justification, that it is a very substantial amount annually.[3]

Secondly, while this Court has consistently sustained the special position which religion has been afforded in American law, *Holy Trinity Church* v. *United States, supra,* at 457, 471,[4] it also has been vigilant in not allowing the conversion of religion's special place into a right or privilege to claim or obtain public aid or assistance in a manner that would offend the constitutional protections written into the First Amendment in guaranteeing for all religious liberty, in the broadest sense. In *Everson* v. *Board of Education*, 330 U.S. 1, 15, Justice Black summed up the Court's understanding of what those fundamental constitutional guarantees prohibit in these words:

> "Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to

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[2] Significantly, President Grant suggested a constitutional amendment in 1875 to provide ". . . that all church property shall bear its own proportion of taxation." The proposal seems never to have been seriously entertained by the Congress or the people. Ames, *Proposed Amendments to the Constitution*, 277 (1897); 4 Cong. Rec. 175 (1875).

[3] See, for some reliable estimates, *Paulsen, supra,* at 153-6.

[4] Exemption from military service for ministers of religion and the members of certain religious sects is another example of religion's unique standing with the Congress and the Court. *The Selective Service Cases*, 245 U.S. 366, 390.

> go to or remain away from his church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt, to teach or practice religion. Neither a state nor the Federal Government can openly or secretly participate in the affairs of any religious organizations or groups, and *vice versa*."

The Court has subsequently adhered to this reading of the reach of the First Amendment. *McCollum* v. *Board of Education*, 333 U.S. 203. It seems fair to observe that the Court's most recent statement on the subject suggests a disinclination to push its interpretation of the First Amendment, as voiced in *Everson* and in *McCollum*, to literal but, petitioners respectfully suggest, historically unsupportable extremes. *Zorach* v. *Clauson*, *supra* at 313. Nevertheless, petitioners do not dispute that the disbursement of public funds, undertaken pursuant to legislation passed with the primary purpose of rendering governmental financial support for religious sects or their institutions, would transgress the First and Fourteenth Amendments. As we show below, however, that is not the case which the Vermont Supreme Court has decided, and review of which is sought in this Court.

The third established line of authority which petitioners discern from previous decisions of this Court, and which they believe controlling in the instant case, is this: Legislation to provide or allow disbursements of public funds for the general welfare of the nation or of a state, including, but not limited to, the welfare of school children, survives the test both of language and of the historical purpose

of the First Amendment. On the other hand, legislation enacted for the primary purpose of rendering "financial assistance or support" to religious institutions does not. *Everson* v. *Board of Education, supra* at 17-18.

The line between constitutionally permissible welfare measures which may benefit religious sects or the institutions which they maintain or operate and legislation designed primarily to aid or support those sects or institutions as such, as the experience of the state courts demonstrates, is often not an easy one to draw. 2 Cooley, *Constitutional Limitations*, 960-985 (1927); 141 A.L.R. 1148; *Everson* v. *Board of Education, supra* at 14. To adjudge, in a particular case, whether a legislatively bestowed benefit to the pupils of sectarian schools so substantially outweighs the benefits also afforded the general public thereby so as to amount to an "establishment" of religion, concededly is a difficult and sensitive task to perform. However, this Court, noting that the question "like many problems in constitutional law, is one of degree," *Zorach* v. *Clauson*, 343 U.S. 306, 314, has laid down guidelines both in terms of decisions reached and reasons assigned therefor, which outline, at least, the extent to which legislative enactments designed to aid the public welfare nevertheless may confer substantial benefits on religious institutions, without exceeding the limitations imposed by the "non-establishment" clause of the First Amendment.

3. *The Controlling Cases.* In petitioners' view, the controlling decisions of this Court begin with *Bradfield* v. *Roberts*, 175 U.S. 291. There, the Court held that an Act of Congress for the District of Columbia, appropriating $30,000 for the construction of two buildings, to be constructed in the discretion of the District Commissioners on the grounds of the two hospitals, one of which was a

private Roman Catholic hospital, did not conflict with the "non-establishment" clause of the First Amendment. There was no argument, of course, about the Congressional power "to appropriate money for the purpose expressed in the appropriation" or of the power of the District Commissioners to enter into the contract with the Catholic hospital. The Court regarded the fact that the hospital was conducted under the auspices of the Roman Catholic Church as "wholly immaterial," since its primary function was "for the care of such sick and invalid persons as may place themselves under the treatment" of the hospital. *Bradfield* v. *Roberts*, *supra* at 299-300.

Thirty-one years after the *Bradfield* decision, but prior to the time when this Court had determined that all the "fundamental liberties" protected under the First Amendment were incorporated in the due process clause of the Fourteenth Amendment,[5] this Court was called upon to decide, in *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, whether the appropriation by a state of tax-raised money to supply free text books for children in private schools, including sectarian schools, as well as for those attending public schools, violated the Fourteenth Amendment. In sustaining the State legislation and appropriation of public funds to provide text books, the Court stated:

> "The legislation does not segregate private schools or their pupils as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded." (p. 375)[6]

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[5] *Cantwell* v. *Connecticut*, 310 U.S. 296.

[6] Subsequent to the decision in *Bradfield* v. *Roberts*, *supra*, and prior to that in the *Cochran* case, *supra*, the Supreme Court in *Quickbear* v.

Finally, in a decision participated in by three of the present members of this Court, the right of a New Jersey township to pay for the transportation of parochial school children on public buses was sustained against the contention that the challenged practice violated the First Amendment, as incorporated in the Fourteenth. *Everson* v. *Board of Education*, 330 U.S. 1. The New Jersey statute involved in the *Everson* case had been implemented by a resolution of the township which authorized disbursement of the taxpayers' money for transportation of school children to and from school, but limited those benefits to pupils attending public schools and Catholic schools. This Court had recent opportunity to reopen the issue decided in *Everson;* it declined to do so. *Snyder* v. *Town of Newton*, 147 Conn. 374, 161 A.2d 770, No. 580, October 1960 Term, appeal dismissed, 365 U.S. ——, 29 U.S.L.W. 3241, February 21, 1961.

The *Bradfield*, *Cochran* and *Everson* decisions establish the principle which controls the instant case. Those cases require review and reversal by this Court of the decision below. As petitioners read them, they demonstrate that Federal or state legislative enactments, including the appropriation of public funds, undertaken for a valid public purpose, such as increasing the facilities for the care of the sick, or the education of the young, are not laws "respecting an establishment of religion," even if sectarian schools and their pupils are also benefited thereby. *Cf. Carmichael* v. *Southwestern Coal Co.*, 301 U.S. 495, 518.

The public service functions performed by non-public

Leupp, 210 U.S. 50, sustained a contract made at the request of Indians that public monies due them under a treaty with the United States be paid by the Commisssioner of Indian Affairs for the support of Indian Catholic mission schools. The Court rejected the argument that the spirit of the Constitution required that the Government "shall make no appropriation whatever for education in any sectarian schools."

schools, including those operated under sectarian auspices, are manifest. An impartial observer of their works has aptly stated:

> "Parochial schools are, in fact, public institutions, though they are not governmentally sponsored and operated. They perform a public function, supplying large numbers of children with an education that is everywhere taken as the equivalent of the education given in the public schools. They have full public recognition as educational agencies. Their credits, diplomas and certificates have exactly the same validity as those issued by Governmental establishments."[7]

The record in the instant case corroborates that the usual and admitted public service functions carried out by qualified sectarian schools were performed by the three Catholic schools to which the South Burlington Town School District made tuition payments. All had been approved by the Vermont Department of Education, as authorized and required by state law, with respect to scholastic standards and the physical facilities which they provide for their students (R. 24). It should also be noted that non-Catholic students attending these sectarian schools were not required to take any courses in religion (R. 22). Children of the non-Catholic petitioner, Anderson, attend one of the Catholic schools to which tuition payments were made (R. 26).

Section 793, Title 16 of the Vermont statutes, under which the South Burlington Town School District is required to pay the tuition of its resident pupils who are required to obtain secondary instruction in schools not operated by their resident school district, does not speak in

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[7] Herberg, *Justice for Religious Schools: A Non-Catholic View*, 7-8 (1958); see also Meiklejohn, *Educational Cooperation Between Church and State*, 14 Law and Contemp. Prob. 61 (1949).

sectarian terms. Rather, it requires payment of tuition by the School District in those circumstances for "pupils at a high school or academy to be selected by the parents or guardian of the pupil within or without the State." Moreover, the School District had the option of paying the tuition to the schools directly or of reimbursing the parents or guardians (R. 24). Like the legislation sustained in the *Cochran* case, the Vermont statute "does not segregate private schools, or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education . . ."

The Vermont statute is even less vulnerable to the argument charging sectarian preference than the township resolution sustained in the *Everson* case, which limited public reimbursements for school transportation exclusively to those attending public *or* Catholic schools. Petitioners suggest that, if the decisions of this Court upholding the constitutionality of public aid on the basis of child benefit and public safety remain the law of the land, the rationale of those cases applies with even greater force to sustain the constitutionality of non-discriminatory state legislation which attempts to provide a minimum high school education for children to whom it otherwise might be denied. If the First Amendment does not interdict disbursement of public funds "to help parents get their children safely and expeditiously to and from accredited schools, regardless of their religion," as in the *Everson* case, *a fortiori*, it would seem the Amendment does not prohibit such expenditures to insure that they are able to go at all.

In reaching its decision in this case, the Vermont Supreme Court placed heavy reliance on this Court's opinion in *McCollum* v. *Board of Education*, 333 U.S. 203. Petitioners, however, find nothing in the result reached in *McCollum* to require the conclusion that the Court be-

low in this case correctly applied the prohibitions of the First Amendment to the tuition payments herein. In *McCollum*, this Court held that religious instruction given in public school buildings by representatives of some, but not of all religious sects, during public school time, with attendance compulsory for the children designated to participate in the program, violated the First Amendment. Not only were tax-supported public school buildings used for the dissemination of religious doctrine, but "the State also [afforded] sectarian groups an invaluable aid [in helping] to provide pupils for the religious classes through use of the State's compulsory public school machinery." *McCollum* v. *Board of Education*, *supra* at 203, 212. The result reached in the *McCollum* case appears to be debatable. Strong reservations are shared by many legal scholars as to the Court's discussion of the purpose and scope of the prohibitions of the "non-establishment" clause and its apparent acceptance of what may be less than conclusive historical documentation. Corwin, *The Supreme Court as a National School Board*, 14 Law and Contemp. Prob. 3, 10 ff.; Murray, *Law or Prepossessions?*, 14 Law and Contemp. Prob. 23, 27 ff.; Fahy, *Religion, Education and the Supreme Court*, 14 Law and Contemp. Prob. 73, 77-82.

Petitioners hope that, should the instant case be heard by this Court on the merits, they might argue to this Court that its apparent understanding of the historical purpose and intended scope of the "non-establishment" clause, as set forth in *McCollum*, rests on assumptions concerning American constitutional history which are open to serious question. However, that argument is neither necessary to assert nor to be maintained at this stage since the decision for which review is now sought, petitioners

believe, is a departure from a firm line of precedents set by this Court and previously discussed herein.

Nevertheless, petitioners do take comfort from this Court's recent decision in *Zorach* v. *Clauson*, 343 U.S. 306. That case surely represents a reconsideration of a possible rigidity of interpretation of the First Amendment to which the Court first adverted in *Everson*, and then asserted when deciding *McCollum*. In any event, for the reasons stated, petitioners believe that at this point they need not assume the burden of convincing the Court that it should overturn or modify its *McCollum* opinion, in order to establish their contention that the decision of the Vermont Supreme Court in this case is not in accord with the line of decisions of this Court which have upheld the constitutionality of payments of public funds made, directly or indirectly, to pupils of sectarian schools, when those payments are made pursuant to general legislation enacted for the public welfare and not for the purpose of giving aid or support to religious sects or institutions as such.

4. *Some Representative Statutory Analogies.* Instances abound of Congressionally authorized assistance to sectarian institutions. Petitioners note here only some of the more prominent illustrations of such Federal aid, direct or indirect. Representative examples include: financial grants to sectarian hospitals under the Hospital Construction Act, 60 Stat. 1041 (1946), 42 U.S.C. 291b, 291i(g) (1957); tuition payments to denominational colleges, including divinity schools, under the Servicemen's Readjustment Act, 58 Stat. 284, 290 (1944), 38 U.S.C. 739 (1946); disbursements to "non-profit, private schools" under the Federal school lunch program, in which children attending parochial schools share, 60 Stat. 230, 233 (1946), 42

U.S.C. 1753, 1759 (1957); and payments of tuition directly to private or parochial schools attended by the pages of this Court, as well as by those of the Congress, 60 Stat. 839 (1946), 2 U.S.C. 88a(c) (1961).

So far as petitioners' research reveals, no attack grounded on the First Amendment has been made on the constitutionality of the Federal assistance furnished under the above-enumerated statutes, much less sustained. In terms of financial benefit, the public funds paid to sectarian institutions under the legislation referred to in the previous paragraph dwarf the tuition payments challenged in this litigation. Petitioners concede, of course, that the amount of any aid rendered to sectarian institutions should not be determinative of its legality under the Constitution. Equally, however, they believe that the form or mechanics of a particular payment to a sectarian school or to its pupils should not control its constitutionality. So long as public expenditures are authorized for a valid public welfare purpose, the fact that sectarian schools or their pupils may be among their recipients does not amount to an "establishment of religion" or to an unconstitutional aid to religion. On this analysis, the decision below is clearly in error. The ruling is not in accord with controlling decisions of this Court. Moreover, it ignores an imposing history of Congressional precedents to the contrary.

B. *The Impact of the Decision Below on State Aid to Non-Public Education*

There is a second and independent ground justifying review by this Court of the decision below. It appears that the precise issue as to whether the use of public funds to pay the tuition of children attending sectarian schools under the circumstances of this case is constitutional has not been determined by this Court. Compelling reasons

exist, therefore, for this Court to take jurisdiction of this case and to clarify or reverse the ruling below.

It may surprise the Court, as it did the petitioners, to learn that out of a total of 42,429 public school systems in the United States, 21,646 did not provide any secondary education in 1960.[8] In Vermont, for instance, out of 257 public school systems in operation in 1960, 167 of them provided public school instruction during the elementary grades only.[9]

It has been a widespread practice in the United States for a long time, when a school district does not provide school facilities and is required by statute to arrange for some of its resident children to attend a school not operated by the school district, that "tuition is paid for them out of the public funds of the resident district." Remmlein, *School Law* (McGraw-Hill, 1950), p. 220. Statutory provisions for the payment by the resident district of tuition in these circumstances generally have been upheld by the state courts. *Boggs* v. *School Township of Cass*, 28 Ia. 15, 102 N.W. 796, and see the cases collected and discussed in Edwards, *Courts and the Public Schools* (Univ. of Chicago, 1955), p. 276. Moreover, the weight of state court authority requires that the resident district bear a proportionate share of the costs of school maintenance incurred by those schools attended by their resident pupils.[10]

Petitioners are not aware of even the approximate number of such school districts as may be authorized, under

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[8] *Public School Systems in 1960*, Bureau of the Census, (November 9, 1960), pp. 5-6.

[9] *Ibid.*, p. 14.

[10] *Smith* v. *Barnard*, 142 Ore. 567, 21 P.2d 204; *City of Dallas* v. *Love*, 120 Tex. 351, 40 S.W.2d 20, aff'g. (Tex. App.) 23 S.W.2d 431; and see cases collected and discussed in *Courts and the Public Schools*, *supra* at 537.

the statutes of their particular states, to follow the practice which the South Burlington Town School District, pursuant to the Vermont statute, observed in this case until the Supreme Court of Vermont invoked the First Amendment to stop it. However many there may be who have done so in the past, it is certain, if the decision of the Court below is allowed to stand, that its interpretation as to the applicability of the First Amendment in the type of situation presented may have immediate and permanent effect in a substantial number of school districts or systems throughout the country.

Justice Holmes, speaking in another context, observed in *Truax* v. *Corrigan*, 257 U.S. 312, 344:

> "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."

Whether or not one agrees that the right of freedom of religion guaranteed by the First Amendment is entitled to a "preferred position" among the rights secured by the Constitution, he still may share Justice Holmes' concern that State power to experiment in solving problems affecting the public welfare should not be subjected to "exuberant judicial restrictions . . ."[11] Justice Holmes' admonition applies, we think, with special force where the deterrence to State experimentation is the consequence

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[11] Frankfurter, *Mr. Justice Holmes and the Supreme Court*, 86 (1938).

not of a Federal, but of a State court's judgment of what the Federal Constitution permits, as in this case.

In the usual case, we are told, a denial of right of certiorari establishes a precedent for nothing but the case in which it was denied, *United States* v. *Carver*, 260 U.S. 482, 490, *Darr* v. *Burford*, 339 U.S. 200, 226-8, or that it means not much more than that, but something more. *Brown* v. *Allen*, 344 U.S. 443, 542-3. In the instant case, however, and in the light of the public interest which current controversies regarding the limitations imposed by the "non-establishment" clause of the First Amendment have provoked, there can be little doubt that the decision of the Vermont Supreme Court, if not clarified or reversed by this Court, may bring to an effective halt many instances where state school systems now are disbursing public funds to pay the tuition of resident pupils who are required to attend a school not operated by the resident district and who elect to attend a sectarian school.

C. *The Impact of the Decision Below on Federal Aid to Non-Public Education*

More important, perhaps, than its effect on the type and quantity of State assistance, direct or indirect, that may be rendered to sectarian schools or the pupils thereof, will be the impact of the decision below on such Federal aid as may be extended to sectarian schools or to the pupils attending such schools, or their parents.

The Chief Executive very recently has advised the Congress that he would like to see legislation enacted which would provide approximately 5.6 billion dollars to assist public school systems and the colleges of the nation.[12] When informing the Congress of his desires, he was care-

[12] *The New York Times*, February 21, 1961, p. 1.

ful in his message not to ask for any funds for sectarian elementary or secondary schools. He stated that his reservation on the question arose out of his opinion that:

> "In accordance with the clear prohibition of the Constitution, no elementary or secondary school funds are allocated for constructing church schools or paying church school teachers' salaries; and thus nonpublic school children are rightfully not counted in determining the funds each state will receive for its public schools." [13]

Following his message to Congress, the President has adhered to his view that decisions of this Court, especially *Everson*, prohibit "aid to the [sectarian] school direct."[14] Legislation embracing the President's proposals for Federal aid to public elementary and secondary schools has been introduced.[15] The pending legislation, complying with the President's firm insistence that aid to sectarian schools is constitutionally prohibited under applicable decisions of this Court, does not provide for any assistance to sectarian elementary and secondary schools or to the pupils thereof.

It would seem manifest, in these circumstances, that a decision by this Court not to review the decision below would be taken by the President and, perhaps, by a majority of the Congress, as a reliable indication that the Vermont Supreme Court has construed the First Amendment correctly and in a manner which the President believes this Court has already done. Whatever understanding lawyers may have of the effect of a denial of certiorari in the great

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[13] *The New York Times*, February 21, 1961, p. 1.

[14] *The Evening Star* (Washington, D. C.), March 1, 1961, p. A-15; *The Washington Post and Times Herald*, March 9, 1961, p. A-17; *The New York Times*, March 8, 1961, p. 18.

[15] H.R. 4970, February 28, 1961; S. 1021, February 20, 1961.

majority of cases, the potentiality for official and public misconstruction at the highest levels of government, perhaps to the permanent disadvantage of private education in America should the Court refuse review of this case, is very great.

If the proposition is accepted by the President, the Congress, and the public at large that the First Admendment prevents any type of direct financial payment to pupils in sectarian schools, it is obvious that any Federal financial aid that will be enacted for the benefit of American primary and secondary education will not include the pupils of sectarian schools. Once they are excluded, it would be very difficult to reverse that exclusion. Under the doctrine of *Massachusetts* v. *Mellon*, 262 U.S. 447, 488, no challenge of Federal aid to education could be raised in the courts. It would be most unfortunate if the deliberate exclusion of sectarian schools from a program of national aid to education was based on an erroneous understanding of what this Court has held to be constitutionally permissible. Review by this Court in the instant case furnishes an opportunity which may never come again to enlighten the President, the Congress, the States, the bench, the bar, the school authorities, the private educators, and the country as a whole, as to what the First Admendment permits or prohibits in the form of direct financial payments of public funds to sectarian schools or to their pupils.

In asking that this Court review the question presented as a consequence of the Vermont Supreme Court ruling in this case, petitioners are not seeking an advisory opinion beyond its authority to grant. *Muskrat* v. *United States*, 219 U.S. 346, 354. The important Federal question decided by the Court below raises a justiciable issue. That question also happens to be one of current controversy in the arenas of Government and public affairs. This Court, of course, never decides cases merely for the purpose of advising

the President or any other public official. *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation*, 333 U.S. 103, 113-14. On the other hand, it has never been the Court's tradition to abstain from its judicial duty of disposing of a justiciable issue properly before it for decision merely because of either the private or public consequences that might attend the decision. Accordingly, petitioners respectfully suggest that this Court not permit the Supreme Court of Vermont to have what may prove to be the last judicial word on the vitally important question presented here.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

PAUL M. BUTLER,
1001 Connecticut Avenue,
Washington 6, D. C.
ALFRED L. SCANLAN,
734 Fifteenth Street,
Washington 5, D. C.
FREDERICK J. FAYETTE,
158 Bank Street,
Burlington, Vermont.
CHRISTOPHER A. WEBBER,
47 Merchants Row,
Rutland, Vermont.
Attorneys for Petitioners.

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APPENDIX A

Opinion of the Supreme Court of Vermont

Holden, J. The immediate concern of this appeal is the expenditure of public funds to meet the charges of tuition for the attendance of students at high schools operated by the Roman Catholic Diocese of Burlington, Vermont. The cause has been well argued and thoughtfully presented, in keeping with the sensitive and solemn issues that confront the Court.

The plaintiff, C. Raymond Swart, started this controversy on his asserted status of a resident taxpayer in the South Burlington Town School District. He has joined the school district, its elected officials and the Attorney General of Vermont as parties defendant to obtain a declaratory decree in equity of his rights, and the corresponding powers and duties of the defendants by the provisions of 16 V. S. A. § 793.

The South Burlington Town School District does not maintain a public high school. It has transferred the task of furnishing plant, faculty and curricula for the higher education of the youth of the town to schools beyond its control that have been selected by the parents and approved by the state department of education.

The aspects of this enactment of which the plaintiff complains provide: "(a) Each town district shall maintain a high school or furnish secondary instruction, as hereinafter provided, for its advanced pupils at a high school or academy, to be selected by the parents or guardian of the pupil, within or without the state. The board of school directors may both maintain a high school and furnish secondary instruction elsewhere as herein provided as in the judgment of the board may best serve the interest of the pupils.

"(b) Each town school district shall pay tuition per pupil per school year as billed, but not in excess of $325.00 unless authorized by a vote of the town school district, but in no case shall the tuition exceed the cost per pupil per year for the maintenance of such school for the previous year."

Acting according to the terms and formula specified in the statute the defendant school district and its officers, during the years from 1952 to 1958 authorized and made payments in varying amounts to the Cathedral High School of Burlington. This institution ceased operations at the close of the first semester of the 1958-59 school year. Its land, buildings and equipment are owned by the Roman Catholic Diocese of Burlington. During the time of operation as an educational establishment, it was conducted as a religious denominational high school of the Roman Catholic Faith.

The Rice Memorial High School, located at South Burlington, opened its courses of instruction at the time of the closing of Cathedral High School on January 30, 1959. Like Cathedral, this school is owned by The Diocese of Burlington. In the 1958-59 school year, the defendants caused the sum of $19,687.50 to be expended and paid directly to the Rice Memorial High School, for the attendance of South Burlington students at this high school.

Mount Saint Mary's Academy is located in the city of Burlington. The land, buildings and equipment are owned by The Sisters of Mercy of The Diocese of Burlington. The defendants have paid tuition to this school, in varying amounts since 1952. The payment for the 1958-1959 school year was $2025.

The chancellor made detailed findings concerning the specific payments to each of these schools and the corresponding tax payments made by the plaintiff over the same period. It is made to appear that the taxes collected from the plaintiff became a part of the public school funds of the South Burlington Town School District which were disbursed by the defendant officials to the institutions named. The chancellor specifically found that these disbursements were in payment of tuition and not for scholarships nor as awards of merit.

Mount Saint Mary's Academy and Rice Memorial High School were determined by the chancellor to be religious denominational high schools of the Roman Catholic Faith, controlled and principally supported by the Roman Catho-

lic Church. Instruction in the religion of that denomination is included in the curricula of both institutions, and is a required subject for students of that faith. There is no requirement that students of other denominations attend the instruction in religion although some students in this category have elected to do so.

Each of the schools concerned has furnished the Department of Education for the State of Vermont the information relating to the cost per pupil in compliance with the statute. The state department of education has established no policy or regulation to specify whether tuition payments under the statute are to be made to the parents of the students receiving instruction or to the school which furnishes the courses of study.

The provisions of 16 V. S. A. § 799 forbid a town school district to pay tuition of a student receiving advanced instruction except to a high school or academy approved by the state board of education. Cathedral High School, Mount Saint Mary's Academy and Rice Memorial High School have received approval from the state board of education as to scholastic standards and educational facilities.

Despite this approval, the plaintiff protests and seeks to have further payments of tuition to these schools enjoined. At the hearing, some of the parents of children attending Rice Memorial High School petitioned and obtained leave to intervene as parties defendant. The intervenors D'Aeuti and Charbonneau are of the Roman Catholic Faith. The plaintiff prevailed in the Court of Chancery for Chittenden County. The defendants and intervenors appeal.

The facts reported by the chancellor are not challenged by any of the appellants. The appeal centers on the declaration of the decree that "payment of tuition by the South Burlington Town School District to sectarian high schools is prohibited by the First and Fourteenth Amendments to the United States Constitution and Article 3, Chapter 1 of the Vermont Constitution."

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the Government for a redress of grievances. Amendment 1 of the Constitution of the United States.

That all men have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences, and understandings, as in their opinion shall be regulated by the word of God; and that no man ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience, nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculia(r) mode of worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner controul the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of christians ought to observe the sabbath of Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God. Article 3rd, Chapter 1, Constitution of Vermont.

The record certified to this Court includes the written opinion of the chancellor which states his analysis of the issues relating to religious liberty and separation of Church and State as defined in these provisions of the state and federal constitutions. In this memorandum the court observed that all parties had seemingly agreed, and the chancellor adopted the theory that the constitutional provisions of the paramount law of Vermont and of the United States establish a common protection, with the effect that a violation of one infringes upon the other. Noting that the issue presented in relation to the Vermont Constitution has not been previously reported in the decisions of this Court, the court below resorted exclusively to the First Amendment and the decisions of the United States Supreme Court. (See Donoghue v. Smith, 119 Vt. 259, 267, 126 A.2d 93, where decision of the constitutional question was not required.)

There has been no objection to the comparison, nor to

the treatment of the problem adopted in the court of chancery. We are not at liberty to belabor the point against established appellate procedure. Perkins v. Vermont Hydro-Electric Corp., 106 Vt. 367, 417, 177 A. 631. But since the objective of these proceedings is to obtain a declaration of constitutional rights and limitations, the variation in historical background and mode of expression in the state and federal provisions is not to be overlooked.

In Vermont, the militant sense of freedom which directed its founders to be the first to write a prohibition against slavery in the establishment of the independent state in 1777, was somewhat reserved in expression of religious liberty. Thus it was that in the original Article III, the declaration "that no man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience" was followed by the limitation—"nor can any man who professes the protestant religion, be justly deprived or abridged of any civil right, as a citizen, on account of his religious sentiment, * * *." In Chapter II, Plan or Frame of Government, a similar limitation is imposed by the oath prescribed for members of the House of Representatives. Vt. Const. 1777, Ch. I, Articles I, III, Ch. II, Article IX; Slade, Vermont State Papers, 1823, pp. 244, 248, compiled by Act of the General Assembly, of Nov. 15, 1821.

The offensive restriction in the Declaration of Rights (Chapter I) was deleted in the Constitution as revised by the First Council of Censors, adopted in 1786. However, the restrictive oath continued until 1793, after the State was admitted to the Union. Vt. Const. 1786, Ch. I, Art. III, Ch. II, Art. XII; Vt. Const. 1793, Ch. I, Art. III, Ch. II, § 16.

Daniel Chipman offers explanation for the early reservations in discussing the adaptation of the Vermont Constitution from its source in the state of Pennsylvania. He points out that while the framers of our constitution were pleased with the Pennsylvania model as it contained a declaration of the rights of religious liberty and conscience, * * * "they were fearful that this religious liberty would

be somewhat larger than the people of New England had been accustomed. And they justly considered that it was necessary to adapt the Constitution to the religious sentiments, habits and customs of the people of the State." Chipman, A Memoir of Thomas Chittenden, (1849) p. 84. See also, F. N. Thorpe, The Federal and State Constitution, Colonial Charters and Other Organic Law, Vol. 6, p. 3779.

"The framers of our Constitution, having, as suggested, founded it on the equal rights of the citizens, and having pretty correct notions of religious liberty, had no idea of authorizing the Legislature to tax the minor sects for the benefit of the standing order, yet they considered that as all classes of the community had a common interest in the support of public worship, as they had in support of the common schools, they ought to contribute in like manner for its support.

"And they authorized the Legislature to pass laws to enforce the observation of the Sabbath, and to tax the people for the support of public worship, trusting that they would do it in such manner as to afford no just ground of complaint." Accordingly, the final clause in Article III, Chapter I was added.

Apparently in response to this provision, the Legislatures in 1778, 1781 and 1783 proceeded to enact laws to carry this concept into effect. The process culminated in the controversial Ministerial Act of 1783 providing taxing authority "enabling towns and parishes to erect proper houses for public worship, and support ministers of the gospel."

This law was the source of constant discord and resentment among the minority denominations until the Legislature divested the towns of all power to support the building of places of worship or to support the clergy. Prior changes in the original act merely aggravated the opposition until "at length the people spoke to the Legislature in a language that could not be misunderstood, * * * we will not permit the Legislature to interfere in any manner with our religious concerns. Thus it has been left to every individual to decide for himself whether he would make

contribution for the promotion of these objects." Memoir of Thomas Chittenden, supra, pp. 86, 91-92; also, Jennings, Memorials of a Century, (1869), in the chapter, "Influence of the Early Settlers of Vermont on Freedom of Worship", p. 362.

A more intense and far-reaching conflict was generated by a contemporary and comparable bill that was introduced in the General Assembly of Virginia in 1784. The legislation proposed was entitled "A Bill Establishing a Provision for Teachers of the Christian Religion" and was designed to enforce tax support for the established church. It failed of enactment and in its defeat it secured the passage of the historic "Bill for Establishing Religious Freedom". The struggle in Virginia and the dominant participation of Jefferson and Madison were translated in the First Amendment of the federal constitution. Everson v. Board of Education, 330 U. S. 1, 13, 67 S. Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392, and cases there cited. For historical background and text references, see dissenting opinion of Rutledge, J., 330 U. S. commencing at 33.

The correctness of the analogy adopted by the chancellor as to the state and federal guaranties is not essential to our decision. In order for the statute to prevail, it must not exceed the limitations of either. In the domain of religious liberty, the resolute history of the First Amendment seems the more demanding. Following the pattern established below, we search the question from the federal aspect.

The basic concept of religious liberty and the separation of Church and State was made applicable to the states with the ratification of the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352, 1356. On questions arising under these amendments the decisions of the Supreme Court of the United States are controlling upon this Court. State v. Scampini, 77 Vt. 92, 121, 59 A. 201.

In determining the validity of 16 V.S.A. § 793, the statute must be tested by its operation and effect rather than by its form. Near v. State of Minnesota, 283 U.S. 697, 708, 51 S.Ct. 625, 75 L.Ed. 1357; State v. Greaves, 112 Vt.

222, 226, 22 A.2d 497. Despite the delicate and highly important functions entrusted to local school boards, they must perform within the limits of the Bill of Rights. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 1637, 147 A.L.R. 674. But the First Amendment must be cautiously applied to the end that the agency of the state is not inadvertently forbidden from extending a public benefit to all its citizens without regard to religious beliefs. Everson v. Board of Education, supra, 330 U.S. at 16. The mere fact that public funds are expended to an institution operated by a religious enterprise does not establish the fact that the proceeds are used to support the religion professed by the recipient. Bradfield v. Roberts, 175 U.S. 291, 298, 20 S.Ct. 121, 44 L.Ed 168; Cochran v. Louisiana State Board of Education, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913, 915; Everson v. Board of Education, supra, 330 U.S. at 18.

In the Cochran case the distribution of text books to parochial schools was sustained. In holding there was no encroachment upon the First Amendment, there is a reminder to the effect that none of the books distributed is expected to be adapted to religious instruction.

In the Everson case a New Jersey statute authorized the local school districts to make rules and contracts for the transportation of children to and from school. The legal controversy was precipitated by action of the Ewing school board when it authorized reimbursement to parents of public transportation expense incurred in attending parochial schools. This effect of the statute was upheld against the challenge of the plaintiff taxpayer that such reimbursement violated the First Amendment. The majority opinion defines the limits of the constitutional guaranty:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. * * * No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or

whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State * * *'."

The Court measured the transportation statute against these limitations. It declined to strike down the New Jersey enactment "if it is within the State's constitutional power even though it approaches the verge of that power." Everson v. Board of Education, supra, 330 U.S. at 15-16.

In State of Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649, 2 A.L.R.2d 1338, the appeal concerned a petition for mandamus which sought to compel the respondents to adopt rules and regulations prohibiting religious instruction in the public schools of Champaign, Illinois. The instruction attacked was conducted by private religious groups of different affiliation during regular school hours but attendance was voluntary. Students who declined the instruction were required to remain elsewhere in the school building.

Counsel for the respondents challenged the limitations stated in the Everson case and requested the Court to repudiate them as *dicta*. In addition it was urged to overrule or distinguish the prior holding that the "establishment of religion" clause of the First Amendment is applicable to the States by force of Amendment XIV.

The Court rejected both contentions. The operation of the program under the Illinois statute, which granted broad authority for such instruction, was held to be "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment as we interpreted it in Everson v. Board of Education, * * *." 333 U.S. at 210.

The reading of the McCollum decision is incomplete without deference to the dissenting opinion of Justice Reed. The thought there expressed exceeds the reach of the majority, but not without limitation. He agreed that

governmental entities cannot aid all or any religions or prefer one over the other. "But 'aid' must be understood as a purposeful assistance directly to the church itself or to some religious group or organization doing religious work of such a character that it may be said to be performing ecclesiastical functions." (dissenting opinion) 333 U.S. at 248.

Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954, followed the McCollum case to the Supreme Court by way of an appeal from the New York Court of Appeals. 303 N. Y. 161, 100 N.E.2d 463. Again the issue presented was "release time" for purposes of religious instruction. It is distinguished from its forerunner in that all costs and facilities for the instruction were borne by the participating religious organizations and the classes were conducted outside the public schools. The provisions of the New York Education Law which permitted the program were held not to be repugnant to the First Amendment.

This is its precept: "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception: the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other." But the Court continued—"Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular instruction to force one or some religion on any person."

The doctrine of these cases narrows our problem to this: Does the payment of tuition to a religious denominational school by a public entity finance religious instruction, to work a fusion of secular and sectarian education?

16 V.S.A. § 793 is the instrument which the Legislature has provided to the local school districts for furnishing the educational training required by the Vermont Constitution, Ch. II, § 64. The enactment entrusts to the school board the decision of whether secondary education will be provided in schools maintained by the district, or elsewhere. If it is to be furnished outside the facilities of the district, the institution to be selected is the choice of the parents or guardian. Buttolph v. Osborn, 119 Vt. 116, 120, 119 A.2d 686. Whatever the decision, attendance at least until the age of sixteen at the institution provided is compulsory. 16 V.S.A. §§ 1126, 1127.

In this instance the defendant school board has elected to discharge its duty by furnishing secondary education outside the public facilities of the district. For a substantial number of its advanced students at least, the legal and public duty of the district is undertaken in religious denominational high schools that are an integral part of the Roman Catholic Church. The Church is the source of their control and the principal source of their support.

This combination of factors renders the service of the Church and its ministry inseparate from its educational function. That this is a high and dedicated undertaking is not to be questioned, and deserves the respect of all creeds. Yet however worthy the object, the First Amendment commands the State shall not participate.

The Bill of Rights secures to those of the Catholic Faith that the State shall not intrude in the affairs of their Church or its institutions. It assures to those of different persuasion that it will not lend assistance to them or those of differing faith in the pursuit of their religious beliefs. Our government is so constituted to the end that the schisms of the churches shall not be visited upon the political establishment. Neither shall the conflicts of the political establishment attend the churches.

Considerations of equity and fairness have exerted a strong appeal to temper the severity of this mandate. The price it demands frequently imposes heavy burdens on the faithful parent. He shares the expense of maintaining the public school system, yet in loyalty to his child

and his belief seeks religious training for the child elsewhere. But the same fundamental law which protects the liberty of a parent to reject the public system in the interests of his child's spiritual welfare, enjoins the state from participating in the religious education he has selected. See Pierce v. Society of the Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468.

Equitable considerations, however compelling, cannot override existing constitutional barriers. Legislatures and courts alike cannot deviate from the fundamental law.

We conclude that the defendants, while acting within the literal provisions of the statute, have exceeded the limits of the United States Constitution.

Decree affirmed.

APPENDIX B

ORDER OF COURT OF CHANCERY OF CHITTENDEN COUNTY.

ORDER AND INJUNCTION

Filed Feb. 19, 1960

In the above entitled case, upon the Findings of Fact, Supplemental Findings of Fact, and Opinion filed, it is hereby ordered, adjudged and decreed as follows:

1. Title 16 VSA Section 793 is construed to require a School District to pay tuition for its advanced pupils at non-sectarian high schools or academies, selected by the parents or guardians of the pupils, within and without the state only.

2. The payment of tuition by the South Burlington Town School District to sectarian high schools is prohibited by the First and Fourteenth Amendment to the United States Constitution and Article 3, Chapter 1 of the Vermont Constitution.

3. The South Burlington Town School District, its Board of School Directors and its Treasurer are hereby restrained and strictly enjoined from paying or causing to be paid tuition of its resident pupils at Rice Memorial High School and Mount Saint Mary's Academy or at other sectarian school within or without the state. Such injunction is hereby stayed until the school year 1960-1961 and during the pendency of any appeal.

Done in Court this 19th day of February, 1960.

WILLIAM C. HILL,
Chancellor.

Appendix C

Opinion of the Court of Chancery

Filed February 10, 1960

Title 16 VSA 793 provides in part that each town district shall maintain a high school or furnish secondary instruction for its advanced pupils at a high school or academy to be selected by the parents or guardians of the pupils within or without the state. This statute also provides for the payment of tuition by the local town district per pupil per school year as billed.

It is claimed by the plaintiff that so much of this statute as permits payment of this tuition, which has been raised through public taxation, to a sectarian school conducted with the inclusion of required religious instruction and under the circumstances set forth in the findings, violates the provisions of the first amendment of the United States Constitution and Article 3, Chapter 1, of the Vermont Constitution.

There is no claim made, nor could there be, that the parents or guardians do not have a choice of school for the education of their children, provided these schools meet the secular requirements. Pierce vs. Society of Sisters, 268 US 510. Buttolph vs. Osborne, 119 Vt. 116. The schools here in question meet such secular requirements.

The narrow issue in this case is not the freedom of choice but rather when such freedom of choice is exercised in favor of a sectarian school operated and conducted as set forth in the findings, can public tax moneys be used for the payment of tuition therefor. As this question concerns itself with the provisions of both our state constitution and the federal constitution, let us examine these pertinent provisions.

Article 3, Chapter 1, of the Vermont Statutes, as here material, is as follows:

> "That no man ought to, or of right can be compelled to . . . . erect or support any place of Worship . . . . . contrary to the dictates of his conscience."

The first amendment of the United States Constitution, as here material, is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

Counsel for all parties have seemingly agreed and the Court adopts the theory that the constitutional provisions under review are similar and that violation of one is violation of the other. As there is only one case in Vermont touching upon Article 3, Chapter 1, of our Constitution, and that concerns itself with another issue, recourse will be had to those federal cases wherein the First Amendment, as applied to the doctrine of separation of Church and State have been interpreted.

The historical background of these constitutional provisions has been so thoroughly set forth in so many cases and opinions that this Court will merely adopt the history of the Vermont constitutional provision as set forth by our Supreme Court in Ferriter vs. Tyler, 48 Vt. 444, and the history of the United States constitutional provision as set forth in the various opinions set out in Everson vs. The Board of Education, 330 U. S. 1. It is against this historical background that the cases herein cited and the opinion herein expressed must be considered.

A review of the cases decided by the United States Supreme Court on this subject discloses that four cases are important. The first case was Cochran vs. Board of Education, 281 U. S. 370. In that case the First Amendment was not in issue. However, the case concerned the furnishing of textbooks by the State of Louisiana to school children, whether attending public or other schools. Chief Justice Hughes, writing for the Court, en[n]unciated the benefit or welfare rule that the books were for the children and the benefit therefore was to the children and the resulting benefit was to the state. At page 375, as part of an extensive quotation from the opinion of the Louisiana Supreme Court, we find this sentence:

> "Among these books, naturally, none is to be expected, adapted to religious instructions."

Subsequent to the Cochran case, which was decided April 28, 1930, the landmark case on this subject was considered. This was the case of Everson vs. Board of Education, supra, decided February 10, 1947. Justice Black wrote the opinion for the Court, Justice Jackson wrote a dissenting opinion in which Justice Frankfurter joined. Justice Rutledge joined by Justices Frankfurter, Jackson and Burton, also wrote a dissent. This Court confines itself to the majority opinion. At page 14, the Court said:

> "In recent years so far as the provision against the establishment of religion is concerned, the question has most frequently arisen in connection with proposing state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect. Some churches have either sought or accepted state financial support for their schools. Here again the efforts to obtain state aid or acceptance of it, have not been limited to any one particular faith. The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments. Their decisions, however, show the difficulty of drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion."

These cases are generally set forth in 5 ALR 879 and 141 ALR 1148. An exhaustive review of these decisions discloses that they stand on their facts as applied to their specific state constitutions. As examples thereof we have the case of Knowlton vs. Baumhover, 182 Iowa 691, and Harfst vs. Hoegen, 163 SW 2nd 609.

Continuing with the Everson case, at page 15, the Court said:

> "The 'establishment of religion' clause of the First Amendment means at least this . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be

called or whatever form they may adopt to teach or practice religion. . . ."

Further, at page 16, the Court said:

"New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment, contribute tax raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion."

The defendant in the instant case has called this Court's attention to Section 2, Chapter 64 of our state constitution. We weigh and consider the implications thereof as being the second commandment of the above quotation from the Everson case.

The Court continued, "Consequently it cannot exclude . . . the members of any . . . faith, because of their faith, or the lack of it, from receiving the benefits of public welfare."

After discussing the services which the general public must receive separate from the religious function, the Court concludes at Page 18,

"It appears that these parochial schools meet New Jersey requirements. The State contributes no money to the schools. It does not support them. Its legislation as applied does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

"The First Amendment has erected a wall between Church and State. That wall must be kept high and impregnable. We could not approve the slightest breach. . . ."

The question of tuition payments was not discussed by the Court. In Note 7 at page 30, the following appears:

"Ewing Township itself provides no public high schools, affording only elementary public schools which

> stop with the eighth grade. The Ewing school board pays for both transportation and tuitions of pupils attending the public high schools. The only private schools, all Catholic . . . The Ewing board pays only for transportation to these schools, not for tuitions."

Subsequent to the Everson case the United States Supreme Court decided the cases of McCollum vs. Board of Education, 333 U. S. 203, and Zorach vs. Clauson, 343 U. S. 306. These cases concern the so-called "release time" programs. In the McCollum case the Court decided that the utilization of public school facilities for the teaching of religion was repugnant to the "establishment of religion" clause, and in the Zorach case the court held that if the school program was adapted to the allowance of releasing children during school hours to attend religious classes outside of school property, that practice did not fall within the constitutional prohibition. What is most important, however, is that in both cases, the Everson case was approved and upheld.

With this historical and judicial background, it now becomes necessary to determine the narrow issue posed by the facts of the instant case.

There is no question that the Catholic religion is taught in the schools here in question.

There is no question that the Catholic students in these schools are required to take courses in religion.

There is no question that these schools are paid public tax moneys.

Testing these facts against the commands of the Everson case, the following conclusion is evident. As public tax money is being paid to a sectarian school wherein a religion is being taught, such payment violates the first command of the Everson case wherein it is stated that no contribution of tax raised funds may be made to the support of an institution which teaches the tenets and faith of any church.

As to the second command of the Everson case, the practice in Vermont wherein sectarian schools are permitted to function, satisfies the statement that we cannot hamper our citizens in the free exercise of their own religion. Our real

problem is deciding whether by refusing this payment of tax money we would exclude the members of any faith from receiving the benefits of public welfare.

If this practice of paying tuitions to a sectarian school is to be justified at all, it can only be justified on the welfare theory set up as the third command. What then are public welfare benefits as meant by the Everson case? The United States Supreme Court has used such examples as health and safety. This public welfare theory then may be applicable to transportation as a matter of safety or to police protection or fire protection or sidewalks or streets or other general services of like kind, because they are disassociated from religion. The practice cannot be justified as public welfare when religion becomes an integral part of the curriculum of the sectarian school.

Here we have a direct conflict between sectarian education convenient to the parents and guardians and paid by public tax moneys and the separation of Church and State. The doctrine of separation must prevail. It is indeed difficult to upset such a long-standing practice, nor is this practice being upset lightly.

The First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. The state must neither favor nor handicap religions. The First Amendment has erected a wall between Church and State. That wall must be kept high and impregnable. This Court could not approve the slightest breach. This practice has breached that wall.

Dated at Burlington this 19th day of February, 1960.

WILLIAM C. HILL,
Chancellor.

(5780-2)

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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 856

WALTER O. ANDERSON, ET AL.,

Petitioners

v.

C. RAYMOND SWART,

Respondent

RESPONDENT'S MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI

STEPHEN B. RICHARDSON
109 So. Winooski Avenue
Burlington, Vermont

HARVEY B. OTTERMAN, JR.
Bradford, Vermont

Attorneys for Respondent
C. RAYMOND SWART

QUEEN CITY PRINTERS, INC., BURLINGTON, VERMONT

RESPONDENT'S MEMORANDUM OF PETITION FOR WRIT OF CERTIORARI

This memorandum is submitted in respect to the petition for a writ of certiorari that seeks to review a determination by the Supreme Court of Vermont. That court invalidated, as violative of the First and Fourteenth Amendments to the United States Constitution guaranteeing separation of Church and State and religious liberty, payments by the Town School District of South Burlington, Vermont, of tuition for its resident students attending sectarian schools which are an integral part of the Roman Catholic Church and are institutions thereof in which said Catholic religion is taught.

In their petition the petitioners state that the ruling may affect twenty-one thousand school systems in the United States and the recommendations and action of the Executive and the members of Congress (page 9.) The implications of this controversy are therefore not limited to the State of Vermont but are nation-wide, and involve important questions under the Establishment and Free Exercise of Religion provisions of the First Amendment of the Federal Constitution. We believe these questions should be considered and authoritatively answered by this court. Accordingly, we do not oppose the granting of the requested writ of certiorari. Nevertheless, we feel it our duty to call the following to this court's attention.

In the petition (p. 2) the question presented is stated to be whether the payment of tuition to sectarian high schools selected by the parents or guardians of pupils residing within the School District or to the parents or guardians of such pupils is prohibited by the First and Fourteenth Amendments to the Constitution of the United States.

While a copy of the printed record, and more specifically the Findings of Fact of the Chancellor in Chittenden County Court of Chancery, has not been forwarded to the Respondent by the Petitioners, so as to permit Respondent to make specific reference to the record, the facts of the instant case conclusively show that payments of tuition were made directly to the sectarian high schools involved and that at the time of such payments, as well as at the present time, there were public high schools available in the area to receive high school students from the Town of South Burlington, Vermont and, further, that such public high schools

were in fact receiving high school students from said Town of South Burlington on a tuition basis.

The Vermont Supreme Court held that such payments to sectarian high schools exceeded the limits of the United States Constitution and that the fundamental law which protects the liberty of a parent to reject the public system in the interests of his child's spiritual welfare, enjoins the state from participating in the religious education he has selected. 167 A2d 514, 520-521.

The Respondent believes it is his duty to advise this court that he disagrees with the petitioner's interpretation of this court's established construction of what the First Amendment permits or prohibits (p. 11-15) and the controlling cases (p. 15-21). Inherent therein lies the respondent's belief that the Vermont Supreme Court did not err in its decision on the federal questions involved which is in accordance with the applicable decisions of this court.

In the petition for writ of certiorari the petitioners discuss what they believe to be the controlling cases (p. 15-21). Two cases cited by them are believed by the respondent to be immaterial and not controlling.

One is *Cochran* v. *Louisiana State Board of Education*, 281 US 370. This case did not involve the First Amendment to the United States Constitution but rather the question was on the violation of the Fourteenth Amendment as taking private property for private purposes. 281 US 375, 74 Led 915. The Court further specifically pointed out, in viewing the question of the state furnishing school books, at 281 US 375,

> "Among these, books naturally, none is to be expected to be adapted to religious instruction."

It was so treated by the Vermont Supreme Court in the decision here appealed from. 167 A2d 514, 518.

The other is *Bradfield* v. *Roberts*, 175 US 291, involving an act of Congress for the District of Columbia, appropriating thirty thousand dollars for construction of two hospitals, one of which was alleged to be a private Roman Catholic hospital. In this case the court specifically found that the allegation of sectarianism was not made to appear. The court said at 175 US 297,

> "If we were to assume for the purpose of this question only, that under this appropriation an agreement with a religious corporation of the tenor of this agreement would be invalid,

> as resulting indirectly in the passage of an act respecting an establishment of religion, we are unable to see that the complainant in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown that it is not."

It is apparent that in both the *Bradfield* and *Cochran* cases the provisions of the First Amendment relating to establishment and free exercise of religion were not involved.

It is the position of the respondent that three recent United States Supreme Court decisions are controlling. The first is *Everson* v. *Board of Education*, 330 US 1, 91 Led 711, which involved the constitutionality of reimbursing parents for the cost of their students transportation to parochial schools; *Illinois Ex Rel. McCollum* v. *Board of Education*, 333 US 203, 92 Led 649; and *Zorach* v. *Clauson*, 343 US 306, 96 Led 954, the last two cases involving "release time" programs (1946, 1948, 1952, repectively).

In the *Eversón* case a *New Jersey* statute authorizing its local school districts to make rules and contracts for the transportation of children to and from school was under scrutiny. The appellee, a Township Board of Education, acting pursuant to that statute, authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular buses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. The court held the arrangement constitutional and specifically found, in the words of the court at 91 Led 725, 330 US 18,

> "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."

The court also felt that the arrangement approached the verge of permissible constitutional power, when it said at 330 US 16, 91 Led 724,

> "But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power."

More important to this case were the words of the court in interpreting the "establishment of religion" clause of the First

Amendment as to what it at least prohibited. The court said at 330 US 15, 16, 91 Led 723,

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion . . . *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion* . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State' . . . New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." (*Italics supplied.*)

The *McCollum* case involved different facts. Religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law. Religious classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend. The classes were taught in three separate religious groups by Protestant teachers, Catholic Priests and a Jewish Rabbi, these teachers being of no expense to the school authorities. Students who did not choose to take the religious instruction were not released from public school duties but were required to leave their classrooms and go to other places in the school building in pursuit of their secular studies. On the other hand, students who were released from secular studies for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.

The court held that this arrangement was beyond all question a utilization of the tax established and tax supported public school system to aid religious groups to spread their faith. It fell squarely under the ban of the First Amendment as interpreted in *Everson v. The Board of Education, supra* (333 US 210, 92 Led 658).

At 333 US 210, 211, 92 Led 658, the court again made clear the ban of the First Amendment of the *Everson* case by quoting therefrom substantially as we have herein quoted above from the *Everson* case. The Court specifically held that a state cannot prefer one religion over another, and further, it cannot give even impartial governmental assistance to all religions (333 US 211, 92 Led 659).

The *Zorach* case involved a slightly different type of "release time" program. New York City had a program which permitted its public schools, upon written request of the parents, to release during a school day those students who attended religious courses operated outside the school building by, and at the expense of, a duly constituted religious body, all other students remaining in the classrooms.

In this situation the United States Supreme Court held that the public schools did no more than to accommodate their schedules to a program of outside religious instruction. They followed the *McCollum* case, but refused to expand it to cover the type of "release time" program under consideration. Separation of Church and State does not mean that public institutions can make no adjustment of their schedules to accommodate the religious needs of the people.

In reaching this decision the court held at 343 US 312, 96 Led 961,

> "And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other."

The court continued at 343 US 314, 96 Led 962,

> "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular instruction to force one or some religion on any person."

The *Everson* case, *supra*, was decided five to four, five Justices holding that the bus transportation payments under consideration

constitutional; four of the opinion that it was unconstitutional. However, as was said in 45 Michigan Law Review 1014,

> "In considering the bearing of the First Amendment on the problem of the Everson case, the court was unanimous on three points: (1) that the specific language of the First Amendment was made applicable to the states by the Fourteenth Amendment, (2) that the history of the movement toward separation of church and state which culminated in religious clauses of the First Amendment indicates the necessity of a broad interpretation of the establishment of religion prohibition, and (3) *that support of a parochial school would be an establishment of religion within the meaning of the First Amendment.*"

The court has continued to remain in agreement on the first and third points, which are the ones material here. *McCollum v. Board of Education*, 333 US 210, 211, 92 Led 658, 659; *Zorach v. Clauson*, 343 US 309, 314, 96 Led 959, 962.

The respondent believes that the Vermont Supreme Court properly held that payment of tuition by the School District out of tax funds directly to sectarian schools violated the First Amendment as interpreted by these three controlling cases.

The second area in which the respondent disagrees with the petitioners is in the petitioners' statements that the payments held unconstitutional by the Vermont Supreme Court were permissible under the exception called by them the "public welfare theory."

Discussion of the welfare theory is immaterial on the facts of this case. It has been rejected in those instances where it has been advanced in cases involving direct payments. *Zorach v. Clauson, supra*, at 343 US 310, 96 Led 1144, 1148. The distinction was succinctly stated by the Chancellor below in his written Opinion when he said:

> "This public welfare theory then may be applicable to transportation as a matter of safety or to police protection or fire protection or sidewalks or streets or other general services of like kind, because they are disassociated from religion. The practice cannot be justified as public welfare when religion becomes an integral part of the curriculum of the sectarian school." (Case p. 35.)

The welfare theory was advanced before the Vermont Supreme Court. The respondent here calls attention to page 7 of his brief in that court:

"The defendants argue on page 12 of their brief that the payment of tuition is not aid to or support of a sectarian institution but rather for the welfare of the individual students involved, hence not prohibited. Factually this position is untenable. There is a cost to the church of furnishing each student a blended curriculum of secular and sectarian education (Case p. 22, Finding No. 13; Case ps. 26-29, Supp. Findings No. 1-6). Without the tuition payments the church would be required to raise these additional funds. Can the defendants deny that the payment from the school years 1952-53 to 1958-59 of $14,681.25 to Mount Saint Mary's Academy (Case p. 22, Finding No. 17), for the school years 1952-53 to 1957-58 of $62,466.40 to Cathedral High School (Case p. 23, Finding No. 18) and for the school year 1958-59 of $19,687.50 to Rice Memorial High School (Case p. 23, Finding No. 19) was not financial aid? It was and is financial aid, raised by taxation, to support religious activities or institutions to teach or practice religion prohibited by the First Amendment. *Everson* v. *Board of Education, supra.*"

CONCLUSION

For the foregoing reasons, the respondent does not oppose the granting of the requested writ of certiorari. Nevertheless, the respondent believes that the Vermont Supreme Court did not err in the interpretation of the First and Fourteenth Amendments of the United States Constitution and the controlling cases construing the same by this court.

Respectfully submitted,

STEPHEN B. RICHARDSON
109 South Winooski Avenue
Burlington, Vermont

HARVEY B. OTTERMAN, JR.
Bradford, Vermont
Attorneys for Respondent
C. RAYMOND SWART